

No. 14,814

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE RALPH JAMES, JR.,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

On December 21, 1954, Abner Mack Taylor saw a light in a house located on Lisga Street in the Town

of Fairbanks, Alaska. He went to his friend, Climie Flenaugh, the owner, and inquired whether the house had been rented.

After receiving a negative answer to the inquiry, he, accompanied by Mr. Flenaugh, proceeded back to the house. There both men saw the appellant come out to the storm porch. Mr. Flenaugh saw the appellant drop the parkas. The appellant then turned around and started knocking on the door. The two witnesses for the appellee observed tracks in the snow leading into the house from the street. Upon entering the house they observed footprints which led to the back room where three parkas had been placed previously.

On December 13, 1954, the door had been locked and the three parkas, the personal property of Climie Flenaugh, were inside the house in the back room. The three parkas lying in the storm porch had no snow on them. Light snow had fallen from 3:33 o'clock in the afternoon until 8:35 o'clock in the evening.

Mr. Wirth, the Fairbanks city police investigator, discovered that the stripping along the door had been pried loose and some thin instrument had been used to force back the lock. When the appellant was searched a pocketknife, flashlight and wallet were found in his possession.

Appellant testified that he went to the house to see some girls and denied having entered the house. He was found guilty of burglary in a dwelling house and

sentenced to imprisonment for a period of eighteen months.

ARGUMENT.

A VACANT HOUSE CAN BE A "DWELLING HOUSE" WITHIN THE ALASKA BURGLARY STATUTE.

Whether the house owned by Mr. Flenaugh can be a dwelling house within the definition of Section 65-5-35 of the Alaska Compiled Laws Annotated, 1949, is the only question raised by the appellant. The fact that the house was vacant and the last tenant did not intend to return to it is not disputed.

However, the Alaska burglary statute, Section 65-5-31 of the Alaska Compiled Laws Annotated, 1949, is not declaratory of the common law. Burglary at common law was considered a crime against habitation. The Alaska Legislature did not follow the common law rule, because in the criminal code of the Compiled Laws of Alaska, 1913, burglary was set forth under Chapter Three as an offense against property. "Burglary of an unoccupied dwelling house is not an offense against habitable security, but is a crime against property, * * *", *Sloan v. People*, 176 Pac. 481, 482 (1918).

Although no record is available to assist this Court in ascertaining the intent of the Legislature, a reasonable explanation exists for making burglary an offense against property instead of the habitation. Mining was the industry in Alaska at the time this statute was enacted. The miners stayed in their cabins along

the creeks until fall, then they went to spend the winter at certain localized points.

Section 65-5-35 of the Alaska Compiled Laws Annotated, 1949, provides that any building is deemed a "dwelling house" within the meaning of the sections of this Act defining the crime of burglary any part of which has usually been occupied by any person lodging therein * * *

A search of the statutes and authorities that are available in our library has failed to disclose another jurisdiction with a definition as set forth in Section 65-5-35. Since the Legislature has classified burglary as a crime against property, the cases following the common law cited by the appellant are not in point.

Although the definition is a compromise between those cases and the Court's decision in *Commonwealth v. Woolfolk*, 121 Ky. 167, 89 S.W. 110, 111 (1905), which held:

"The term 'dwelling house' is therefore one of differentiation, a name which distinguishes it from every other house or class. To constitute a building a dwelling house, it is not necessary that it be occupied as a place of residence by a family or person. If constructed for use as a place of residence by a family or person, it is a dwelling house even in the process of erection, and is known as and called a 'dwelling house.' The same is true of a dwelling house that becomes for a time vacant after being occupied by a family or person as a place of residence. Having been designed for and used as a dwelling house, it remains a dwelling house, though temporarily unoccupied, until converted to some other use."

This definition of a dwelling house was followed in *Thomas v. Commonwealth*, 150 S.W. 376, 377 (1912).

The record discloses that Mr. Flenaugh's house has usually been occupied when any person lodged therein. After he purchased it in 1952, a family rented the house for six or seven months. (TR 49.) Then, two women rented the house which was furnished enough that they could cook their meals there. (TR 27.) Mr. Wirth observed a kitchen stove and two beds in different rooms. (TR 64.) The appellant even considered this house to be a dwelling house as shown by his testimony. (TR 74.)

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the District Court.

Dated, Fairbanks, Alaska,
September 20, 1956.

Respectfully submitted,

GEORGE M. YEAGER,

United States Attorney,

Attorney for Appellee.

(Appendix Follows.)



Appendix.

Appendix

ALASKA COMPILED LAWS ANNOTATED, 1949.

65-5-31. *Burglary in dwelling house:* If any person shall break and enter any dwelling house with intent to commit a crime therein, or, having entered with such intent, shall break any such dwelling house or be armed with a dangerous weapon therein, or assault any person lawfully therein, such person shall be deemed guilty of burglary, and upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; provided, however, if said burglary be committed at night time the maximum penalty shall be fifteen years and provided further that if a human being be within the dwelling at the time of said burglary, either night time or day time, the maximum penalty shall be twenty years.

65-5-35. "*Dwelling house*" defined: That any building is deemed a "dwelling house" within the meaning of the sections of this Act defining the crime of burglary any part of which has usually been occupied by any person lodging therein, and any structure joined to or immediately connected with such building.